

Editor's note: Erratum issued dated Feb. 3, 1976 -- See 23 IBLA xxxxA; Appealed -- aff'd. Civ. No. 76-408 (D.Ariz.), rev'd, No. 77-2783 (9th Cir. Feb. 11, 1980), 613 F.2d 224, cert. denied, S.Ct. No. 79-1964, (Oct. 20, 1980), 101 S.Ct. 332, 449 U.S. 932

UNITED STATES
v.
MELTON E. BAKER

IBLA 71-137

Decided January 19, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing, in part, contest complaint and holding valid the Wildcat Hill Nos. 1 through 4 placer mining claims (Arizona 034727).

Affirmed in part, reversed in part.

1. Mining Claims: Determination of Validity--Mining Claims:
Discovery: Generally

A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity

The Act of July 23, 1955, 30 U.S.C. § 611 (1970), removed common varieties of cinder from location under the mining laws; thus, it is incumbent upon one who located a claim prior to that date for a common variety of cinder to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date.

3. Mining Claims: Determination of Validity--Mining Claims:
Discovery: Marketability--Mining Claims: Excess Reserves

Material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws, and even if the material is suitable for other purposes, its sale for the above uses cannot be considered in determining its marketability to establish the value of the deposit as mineral. By the same token, it is improper to consider the market demand for such uses for the purpose of determining what volume of mineral material a prudent locator might claim in the reasonable anticipation of market demand for legitimate mineral uses in the foreseeable future, reasonably projected.

4. Mining Claims: Determination of Validity--Mining Claims:
Discovery: Generally--Mining Claims: Excess Reserves

Where it has been shown as to a number of mining claims located for cinders for which application for patent has been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellant; William N. Hackenbracht, Esq., Tognoni & Pugh, Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Forest Service, Department of Agriculture, has appealed from the November 27, 1970 decision of Administrative Law Judge

Robert W. Mesch 1/ dismissing, in part, a contest complaint against the Wildcat Hill Nos. 1 through 4 placer mining claims on the basis of his finding that the claims were properly located and a discovery of a valuable mineral deposit was established on each of the claims prior to July 23, 1955, and continued to the time of the hearing.

On March 19, 1965, Melton E. Baker filed patent application Arizona 034727 for the Wildcat Hill Nos. 1 through 5 placer mining claims in section 9, T. 21 N., R. 8 E., G. & S.R.M., Coconino County, Arizona. The subject claims were alleged to have been originally located by Baker in 1952, with the location notices placed on the ground at that time. Copies of location notices for the claims were not recorded until February 23, 1965. 2/ The claims are situated in the Coconino National Forest adjacent to U.S. Highway 66, and lie a few miles east of the city of Flagstaff, Arizona. The claims rest upon a cinder cone within a volcanic field and were located by appellee for their cinder material.

On April 8, 1954, the Harenberg No. 2 association placer mining claim was recorded in the office of the Coconino County Recorder. This claim covers the exact area encompassed by the Wildcat Hill Nos. 1 through 4 claims. The co-locators were Urban M. Harenberg, LaVaun Harenberg, Andrew J. Morgan, and the appellee, Melton E. Baker.

At the request of the Forest Service, the Bureau of Land Management issued a complaint on August 15, 1966, seeking the cancellation of the Wildcat Hill Nos. 1 through 5 and Cinder placer mining claims. 3/

1/ A change of title from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission and implemented by amendment of 43 CFR Subtitle A, 38 F.R. 10939 (1973).

2/ In his patent application, Baker stated that in the event his locations were deemed insufficient under pertinent mining laws, he was claiming the land, alternatively, pursuant to 30 U.S.C. § 38 (1970), and that the applicable State statute required 5 years of occupancy for a claim of adverse possession to be actionable.

3/ On the same date, the Bureau issued a complaint against Baker and Harenberg seeking cancellation of the Harenberg No. 2 claim. The Wildcat Hill No. 5 and the Cinder claims were later dismissed from the complaint now before the Board.

On October 8, 1965, Harenberg had filed with the Department a mineral adverse claim against Baker's patent application insofar as the Wildcat Hill Nos. 1 through 4 claims were concerned. See 30 U.S.C. § 29 (1970). On November 1, 1965, Harenberg initiated a suit, Harenberg v. Baker, Civ. No. 22652, in the Coconino County Superior Court, challenging Baker's title to the claims. A Departmental hearing on the Wildcat Hill contest was suspended pending the outcome of the civil action. See 30 U.S.C. § 30 (1970).

On June 2, 1967, the Judge of the Superior Court issued his decision in Harenberg v. Baker, which included, in part, the following findings and conclusions: (a) Baker had produced and sold cinders from the claims continuously since the fall of 1952, "having produced approximately 4,000 cubic yards of cinders in 1952, 7,000 in 1953, 7,000 in 1954, and approximately 1,000,000 from 1952" to the date of judgment; (b) in 1952, Baker posted location notices and put up corner monuments for the Wildcat Hill Nos. 1 through 4 placer mining claims, but did not record any copies of the location notices until February 23, 1965; (c) Harenberg informed Baker that the latter could not hold title to the area in question because one person could not locate contiguous placer mining claims, and this misstatement was a material factor in causing Baker to enter into an agreement with Harenberg permitting the location of the Harenberg No. 2 claim and requiring Harenberg to purchase cinders from the claim for use in making cinder blocks; (d) Baker did not intend to abandon his pre-April 8, 1954, location rights; and (e) prior to April 8, 1954 (when the Harenberg No. 2 claim was recorded), Baker had good title to the area in question under his Wildcat Hill Nos. 1 through 4 unpatented mining claims through pedis possessio, subject only to the paramount title of the United States. 4/

After the Superior Court judgment became final, a 5-day Departmental hearing to determine the validity of the claims was held commencing November 3, 1969, at Flagstaff, Arizona. 5/ Thereafter,

4/ The Superior Court Judge also concluded that Baker had established his sole title to the area in question by adverse possession, pursuant to A.R.S. § 12-526 and § 12-527.

5/ We note that the Superior Court Judge held that Baker had established discoveries on his claims. Although a state court may afford a presumption of discovery to the locators of a mining claim in determining possession between private claimants, such presumptions are in no respect applicable or binding in contests between the United States Government and the claimants to determine whether a valid discovery has been made. See Perego v. Dodge, 163 U.S. 160, 168 (1896); United States v. Fleming, 20 IBLA 83 (1975); United States v. Ramsey, 14 IBLA 152 (1974); Estate of Bowen, 14 IBLA 201, 81 I.D. 30 (1974).

in his decision dated November 27, 1970, Judge Mesch determined that: the cinder deposits found within the claims were "common varieties" within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970) (Decision at 5); the contestee established by a preponderance of the evidence that he located the four Wildcat Hill claims and was asserting rights in the lands under the mining laws prior to the location of the Harenberg No. 2 claim in 1954 (Decision at 10); the locations covering the subject claims were not defective for failure to timely record the location notices (Decision at 11); the subject claims were not abandoned by Baker when he joined in the Harenberg No. 2 location (Decision at 14); the contestant did not present a prima facie case in support of the allegations that the claims were not supported by valid discoveries prior to July 23, 1955, or at the time of the hearing (Decision at 16, n. 20) 6/; the contestee showed by a preponderance of the evidence that the subject claims were perfected by valid discoveries prior to July 23, 1955, and that the claims were supported by valid discoveries at the time of the hearing.

In its Statement of Reasons on Appeal, appellant argues that the Administrative Law Judge reached a number of erroneous conclusions in the areas of (1) the validity of the various purported mining locations, (2) the issue of abandonment or forfeiture, and (3) the issue of whether the contestee had satisfied the requirements for establishing the existence of a "valid discovery" on each of the subject claims. On the third point, appellant urges that the Administrative Law Judge did not apply a proper test with respect to the existence of discoveries on the subject claims. Appellant concludes that "since the contestee failed to show that this [discovery] test had been met by him prior to July 23, 1955, the claims should each be declared null and void for this reason, if not on the basis of the other issues." (Statement of Reasons at 11).

At the hearing Gilbert J. Matthews was called as an expert witness on behalf of the contestant (Tr. 29). Matthews is a mineral examiner employed by the Forest Service.

Matthews was of the opinion that Baker had not established a discovery of a valuable mineral deposit on any of the subject claims prior to July 23, 1955 (Tr. 232). This conclusion was

6/ Judge Mesch added that, "It would not, however, serve any useful purpose to grant the contestee's motion to dismiss the proceedings on this ground. The Forest Service could simply institute another contest * * *."

based primarily upon his examination of two aerial photographs, the first taken on March 7, 1954 (Exs. 7, 9), and the second taken on May 10, 1958 (Ex. 11) (Tr. 126-27, 500). Matthews testified that the 1954 photograph depicted no signs of development on any of the claims (Tr. 130-31), and that the 1958 photograph depicted pit development only on the Wildcat Hill No. 2 claim, with no excavations discernible on the Wildcat Hill Nos. 1, 3 or 4 claims (Tr. 131, 232, 626).

During direct examination, Matthews added that he first examined the cinders in the various workings in 1964 and concluded that they were a common variety material (Tr. 264, 430, 450). He testified that his conclusion was buttressed after he was informed that some of the material from the claims was marketed as topsoil for groundcover (Tr. 267), and after he was informed by the Arizona Highway Department and the City of Flagstaff's engineering office that cinder material in the area did not have any special or distinct qualities (Tr. 443, 447).

With regard to the uses and marketability of cinders, the following was stated:

Q. [H]ave you obtained any knowledge about the use of cinders in this area?

A. I have endeavored to, yes.

Q. What have you learned about the use of it? What uses are there?

A. The uses are principally -- I would say the biggest use of the cinders is for fill material. They used a tremendous amount of it on this new highway.

Q. Just uses, now. Okay, highway uses. You mean for fill on the highway?

A. Yes.

Q. Okay. Now, what other uses?

A. For surfacing, loose surfacing material on driveways and homes. There has been some use for trench drains, and coarse material that has been previously mentioned for any situation where they want to have a loosely consolidated material through

which water could freely drain. In the past, they have used considerable cinders for macadam road tops. They use them for cinder block. That is quite an industry here.

* * * * *

Q. All right. Can you tell us what you have learned about the marketing conditions?

A. My observations are that the marketing of cinders in this area is highly competitive. People who are fortunate enough to have their own pit, it is a matter of obtaining a user. Most of the people that I have encountered holding pits have depended on other people to do their mining and they make a minimum charge of -- the rate now seems to be ten cents a cubic yard in place. Loading and hauling is the responsibility of the user.

(Tr. 561-63).

Matthews also testified that he had discussions with various persons, including Baker, concerning the market conditions as they affected the cinder deposits on the subject claims (Tr. 571-72). He pointed out that, with regard to the validity of the claims, he had considered the cost factors associated with marketing the cinders from the claims: i.e., transportation, excavation, stripping, crushing, sizing, screening, etc. (Tr. 655).

On cross-examination Matthews admitted that there were some problems regarding adequate interpretation of the photographs since there was some snow coverage on the ground in the 1954 photo (Tr. 137, 138, 173); he did not know the elevation from which the photos were taken (Tr. 139, 158); there was a problem of detecting excavations below trees (Tr. 168, 297, 301); and the moisture content of the soil affected the ability to determine the existence of excavations (Tr. 174, 285). And as Judge Mesch correctly pointed out, assuming Matthews' photo interpretation was correct, the most it established was that the pit on the Wildcat Hill No. 2 claim could have been developed any time after March 7, 1954 (Tr. 131).

Thereafter, a number of witnesses were called to testify on behalf of the contestee. Georgeann Tognoni, a cartographer employed by the Mineral Economics Corporation, testified that she had examined aerial photographs of the subject claims and had made a ground examination in order to map the claims and the pits thereon (Tr. 289-297,

Ex. B). Melvin McCormick testified that he had been in the mineral materials business since 1921 in the Flagstaff area (Tr. 330), and that Baker had been on the Wildcat Hill claims since 1952 (Tr. 341-42). Roberta Forehand testified that she and her husband located cinder claims on Sheep Hill, an area northeast and slightly closer to Flagstaff than appellee's claims (Tr. 349). Prior to his moving to Wildcat Hill, Baker removed cinders from Sheep Hill until the Forehands asked him to move to his own pit (Tr. 349). Mrs. Forehand testified that Baker began developing his claims by hauling "dirty cinders" off of Wildcat Hill around 1952 (Tr. 374, 376). She described "dirty cinders" as useful for fill purposes, as opposed to "clean cinders" which are useful in cinder block production and for road surfacing (Tr. 372).

Frank Martinez testified that he first met Baker in 1955 (Tr. 391). Martinez stated that he hauled cinders from Baker's pits from April 1955 until the time of the hearing (Tr. 395). He described this activity as follows:

BY MR. FOWLER:

Q. What were you doing with these cinders in 1955 when you first started hauling?

A. I would sell them to people around town.

Q. Do you know what they were doing with them?

A. Well, they would use them for their front yards.

* * * * *

HEARING EXAMINER MESCH: What do you mean when you say they would use them for front yards?

THE WITNESS: Well, in front of the garage, driveways.

HEARING EXAMINER MESCH: Any place else in the yard?

THE WITNESS: Mud holes. That's about all I can say. That is what they use them for, mud holes.

BY MR. FOWLER:

* * * * *

Q. Could you tell us how much you paid for the cinders in 1955, the ones you were hauling out?

A. I wasn't paying anything for them, because he was digging and trying to get started.

Q. At what point in time did you start paying for the cinders? What year? Could you tell us that?

A. Oh, I'd say when I would get a big job that I am selling them, I pay him for what I take out.

Q. What is the first year in which you actually paid Mr. Baker for using some cinders from his pit?

A. Probably in '63.

MR. FOWLER: That's all.

REDIRECT EXAMINATION

BY MR. HACKENBRACHT:

Q. Mr. Martinez, were you helping Mr. Baker to remove overburden when he was beginning his pit?

A. Yes, sir.

Q. Is this the material then that he was not charging you for?

A. That's correct.

MR. HACKENBRACHT: No further questions, Your Honor.

(Tr. 398-401).

A partial summary of Baker's testimony is set out in Judge Mesch's decision at 17:

Mr. Baker testified (1) that prior to July 23, 1955, cinders were extracted, removed, and marketed from each of the four claims (Tr. 813, 895, 896);

(2) that the claims have been continuously worked since at least 1953, and they are presently being worked (Tr. 787, 788, 835); (3) that he probably sold around 4,000 yards in 1953, 4,000 yards in 1954, and 6,000 or 7,000 yards in 1955 (Tr. 812, 813, 871); (4) that he estimates that he has produced over a million yards of cinders from the four claims since 1953 (Tr. 788, 814); (5) that he has not personally hauled and marketed cinders for a long time, but operates the pits on a royalty-type basis where he gets ten cents a yard for cinders in place, and in addition, the purchaser who provides his own equipment, pays him construction scale wages to assist in extracting and removing the cinders (Tr. 803, 815); (6) that the cinders have been used for, among other purposes, insulation in cinder blocks (Tr. 812); in the surfacing of asphalt roads (Tr. 817), to provide a porous fill that will not retain water or moisture behind concrete abutments (Tr. 817, 930), for packing around road culverts (Tr. 817), for cinder blocks (Tr. 818), in leaching fields or drains for septic tanks (Tr. 808), and for driveways, yards and mud holes (Tr. 808, 812); and (7) that in 1959, they started construction of a house on the property and they have resided there since 1960 (Tr. 850, 891).

In addition to the above, Baker testified to the following: when he began his operation on the claims he was not earning a living solely from hauling cinders but was also building roads (Tr. 762); he has concentrated his activities on the main pit on claim No. 2 (Tr. 806); between 1952 and 1955 the main pit produced "coarse cinders" used for "leach lines, and holes, stuff like that." (Tr. 807-08, 872); when he first started developing the claims he permitted persons to take material off the claims at no cost (Tr. 878); in 1952 he had two trucks, a loader, and a bulldozer, all of which belonged to his uncle (Tr. 882); eventually he bought a dump truck and returned the other equipment to his uncle after they had a falling out (Tr. 883-84).

Donald F. Reed, a mining engineer and retired BLM mineral examiner, testified that he examined the subject claims in 1969 (Tr. 910). He concluded that the material on the claims was a common variety of cinders having no special or distinct qualities (Tr. 937-38). With regard to marketing the cinder from the claims,

Reed testified that the market was highly competitive in the sense that there "is" a good market for cinders and several firms "are" engaged in producing cinders (Tr. 964-65). With regard to his opinion concerning the validity of the subject claims, Reed testified as follows:

* * * There can be no question in anyone's mind as to the existence of the mineral, which is in this case cinders. That whole hill is cinders. So there can be no question of the discovery of cinders on any one of the claims. The value is quite evident. These cinders have been sold, and at their very minimum value, which is ten cents per yard, this constitutes a -- There has been more than one million yards of cinders removed and sold from these claims. Now, that is \$100,000, which is not hay. I think there is no question in anyone's mind that any man would be prudent in attempting to hold or develop these claims.

* * * Considering all these factors, it is my opinion that the claims are valid and, therefore, under the law, the Bureau of Land Management, it is mandatory upon them that they approve Mr. Baker's application for patent and issue a patent.

(Tr. 932-33).

Hale C. Tognoni was called as an expert witness on behalf of the contestee (Tr. 968). In addition to having a law practice, Mr. Tognoni is also a consulting mining engineer and geologist for the Mineral Economics Corporation (Ex. QQ). His testimony was general in nature and concerned the age and size of the various pits on the subject claims (Tr. 1001-02).

In rebuttal, the Government called on Urban Harenberg to testify (Tr. 1048). Harenberg testified that he has a block manufacturing plant which uses cinders (Tr. 1048). He was on the subject claims in 1953 and 1954 but knew little about the quantity of material removed (Tr. 1052, 1060). He stated that some of the cinders on the subject claims could be used for making cinder blocks (Tr. 1102), and that he hoped to eventually have the Harenberg No. 2 association claim validated (Tr. 1104). 7/

7/ It appears that the total supply of cinders in the general area of Flagstaff significantly exceeded the demand for the material for cinder block use prior to July 23, 1955, as Harenberg used cinders in this business from many other claims, but not the ones in issue. See United States v. Harenberg, 11 IBLA 153 (1973); United States v. Harenberg, 9 IBLA 77 (1973), and the testimony of Roberta Forehand, supra.

We now turn to an examination of the record. The Administrative Law Judge rejected the Government's arguments for the following reasons (Decision at 18-19):

The Forest Service insists that the evidence offered by the contestee is deficient in that there is some indication "that the sales were for topsoil and fill, which uses did not make the material locatable" (Brief, p. 20), and "even if all sales are considered there is no method to determine whether there was a profitable exploitation of the cinders" (Brief, p. 26).

The amount of topsoil, if any, that was removed and sold would be so minimal in comparison with the amount of cinders extracted and marketed that it is not worthy of consideration. Cinders were sold for fill purposes and if this was the sole use for the cinders from the claims, the material would not be locatable under the mining laws (United States v. William M. Hinde, et al., A-30634, July 9, 1968). I am of the opinion, however, that the evidence offered by the contestee (and also to some extent by the Forest Service) makes it abundantly clear that a person of ordinary prudence would have been justified prior to July 23, 1955, and prior to the time of the hearing in removing and marketing the cinders from the four Wildcat Hill claims for uses recognized by the mining laws.

* * * * *

I conclude that the contestee has shown by a preponderance of the evidence that the four Wildcat Hill claims were perfected by valid discoveries prior to July 23, 1955, and that the claims are presently supported by valid discoveries. (Footnote omitted.)

* * * * *

We find the evidence shows that Baker had been hauling and selling cinders from pits owned by others for a number of years prior to his location of his own deposit. The record also indicates that during the late 1940's and early 1950's a number of other individuals had located cinder claims in the area, opened pits, and, seemingly, were attaining modest success in the profitable exploitation of their deposits. Baker, then, being acquainted

with these people and what they were doing, and having considerable experience in the business and knowledge of the local market, was in a position to make a prudent decision to locate a deposit of his own rather than continue to haul and sell from the pits of others. Having determined that Wildcat Hill contained a deposit of adequate quality and vast quantity, he had sufficient basis for belief that he could develop a valuable mine (quarry) thereon. We think that the evidence is sufficient to show that he then proceeded to open three small pits, *i.e.*, Pit No. 1 on the boundary line between Wildcat Hill Nos. 2 and 3 claims, Pit No. 1-A on the Wildcat Hill No. 2 claim, and Pit No. 3-A on the Wildcat Hill No. 1 claim (Tr. 870, 871). Pit No. 1 became the focus of the bulk of his operation and extended well into the Wildcat Hill No. 3 claim.

[1] A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 559 (1968). On the basis of this test we think that Baker was well justified in considering that he had discovered a valuable deposit of cinders on Wildcat Hill and in claiming at least a portion of that deposit under the mining law.

This test (the prudent man rule) has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman, *supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of cinder claims. United States v. Harenberg, 11 IBLA 153 (1973); United States v. Harenberg, 9 IBLA 77 (1973); United States v. Chapman, A-30581 (July 16, 1968).

There is no contention that the subject claim contains an uncommon variety of cinders, and the evidence clearly shows that the cinders on the claims are used for ordinary purposes. Accordingly, we concur in Judge Mesch's finding that the cinder material on the subject claims is a common variety within the context of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). See the Harenberg cases, *supra*.

[2] The Act of July 23, 1955, removed common varieties of cinder from location under the mining laws. Thus, it is incumbent upon one who located a claim prior to that date for a common variety of cinder to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir.1974); Barrows v. Hickel, 447 F.2d 80 (9th Cir.1971); Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir.1968).

On the basis of these tests we have little difficulty in agreeing with Judge Mesch that Baker discovered a valuable deposit of common variety cinders prior to July 23, 1955, for which there was an existent demand, that there was adequate access to the deposit, the deposit was within reasonable proximity to the market, and that he then initiated a bona fide effort to develop a mine.

[3, 4] However, we are unable to agree with Judge Mesch that the evidence of record is sufficient to support a finding that all four claims were valid on July 23, 1955.

In his application for patent Baker estimates that there are 15 million tons of cinders available from these claims. Estimates of total removals from 1953 to date range from 700,000 to 1 million tons.

During the critical period prior to July 23, 1955, the evidence shows that the market for cinders was very competitive. As hereinbefore stated, numerous others in the same vicinity were already developing their own cinder pits, and the record shows that while they were succeeding to some degree, economic survival was difficult and uncertain. Roberta Forehand testified that she and her late husband opened a cinder pit at Sheep Hill on mining claims which since have been patented. In 1952 Baker was buying and hauling cinders from the Forehand pit and selling them independently in competition with the Forehands. She testified that at that time she and her husband and their children were working 7 days a week until past dark on the claims, that they had invested all of their financial resources in the project and, at the time "we were living on pennies." Under the circumstances, the Forehands considered that it was not to their advantage to allow Baker to continue to compete with them using their own cinders and improvements. They therefore terminated Baker's operation in their pit, but Mr. Forehand helped him to locate the Wildcat Hill claims on the theory that if Baker had to develop his own pit he would have to adjust his charges accordingly, to the benefit of his competitors (Tr. 366-67).

Under the circumstances we cannot agree that prior to July 23, 1955, Baker could reasonably have anticipated a need for 15 million tons of cinders, particularly when we take into account that some substantial portion of the available market was for purposes which are not cognizable under the mining law.

The testimony establishes that a very large volume of the material sold from these claims was purchased for use as fill and sub-base. In United States v. Bienick, 14 IBLA 290, 293 (1974), we reiterated the long-established rule as follows:

Material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws, and even if the material is suitable for other purposes, its sale for the above uses cannot be considered in determining its marketability. (Emphasis added.)

See also United States v. Harenberg, 11 IBLA 153 (1973), United States v. Barrows, 76 I.D. 299 (1969); aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir.1971); United States v. Hinde, A-30634 (July 9, 1968); United States v. Brewer, A-27908 (December 29, 1959); United States v. Proctor, A-27899 (May 4, 1959).

It follows that if sales of material for such non-cognizable uses cannot be considered in determining the marketability of the material in order to establish the value of the deposit, it would be equally improper to consider sales for such uses for the purpose of determining what volume of material a prudent locator might claim in the reasonable anticipation that the demands of the market would require that amount in the foreseeable future, reasonably projected.

Judge Mesch noted in his decision that Baker sold cinder for fill, and that if this were the sole use of cinder from the claim, the material would not be locatable under the mining law. However, the Judge ventured the opinion that the evidence made it clear "that a person of ordinary prudence would have been justified in removing and marketing the cinders * * * for uses recognized by the mining laws" (Dec., 16). This opinion was not premised upon any showing in the record of what proportion was sold for legitimate uses and what proportion was sold for fill, sub-base, grade material, and the like. Indeed, much of the material was sold to purchasers who simply hauled it away for purposes known only to them. In any event, a review of the contest record makes it quite clear that of the estimated 700,000 to 1 million tons sold and removed from the claims between 1952 and 1970, a substantial amount did go to uses

which are not validating under the mining law, although the factor by which the total volume should be reduced is unknown. By the same token, the total revenue, estimated at \$100,000 over the entire term, is subject to reduction by the same unknown factor.

The location of multiple claims containing deposits of mineral vastly in excess of any reasonably anticipated market need has been the topic of previous decisions. In United States v. Anderson, 74 I.D. 292 (1967), the Department held:

Where it has been shown as to a number of mining claims located for perlite, and for which applications for patents have been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery. (Emphasis added.)

This Board adhered to the foregoing rule in the more recent case styled United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972), which involved the location of multiple claims containing deposits of gypsite apparently in excess of any volume required as a reasonable reserve in the circumstances prevailing.

United States v. Harenberg, 11 IBLA 153 (1973), involved a claim for a similar deposit of cinders in the same vicinity as the cinder claims which are the subject of this appeal. In affirming the holding that Harenberg's Lava claim was null and void for want of discovery, this Board added the following observation, at page 158:

Finally, we note that in the first Harenberg, *supra*, we approved for patent 40 acres of the Harenberg No. 1 claim as a reasonable reserve supply. Even were we to reach an opposite conclusion with respect to the value of the deposit on the Lava claim, we would then have to consider the issue of excess reserves. However, in light of our holding this will not be necessary.

The record in the instant case is totally devoid of any evidence which would even tend to justify Baker's location of multiple claims embracing 15 million tons of cinders prior to July 23, 1955. Neither is there any evidence that there was, or is, any likelihood

whatever that the market demand, reasonably projected for years into the future, will or could absorb such a quantity from these claims for purposes recognized under the mining law.

Accordingly, we find that although Baker was justified in the reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, he located claims for far more land and mineral than reason and prudence would allow.

The largest working by far (Main Pit No. 1) is situated on the Wildcat Hill No. 2 claim and extends well into the Wildcat Hill No. 3 claim. There is abundant room on these two claims for expansion of the main pit or the opening of additional pits, which would assure a source of supply for many years. These two claims also embrace most of the other improvements of consequence, including Baker's dwelling, the water tank, truck scales, stable, and most of the road net, including the old original haul road and the new haul road presently in use (Exh. 5). Obviously, these claims "would make the most feasible mining operation." United States v. Anderson, *supra*; United States v. Bunkowski, *supra*.

By contrast the workings on the Wildcat Hill Nos. 1 and 4 claims, although numerous, are comparatively small and scattered and, aside from the access roads, are otherwise unimproved.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the Wildcat Hill Nos. 2 and 3 placer mining claims and reversed as to the Wildcat Hill Nos. 1 and 3 placer mining claims, which are hereby held to be null and void, and the case is remanded to the Bureau of Land Management for such further administrative procedures as may be necessary to implement this decision.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

February 8, 1976

IBLA 71-137	:	Arizona 034727
	:	
UNITED STATES	:	
	:	
v.	:	
	:	
MELTON E. BAKER	:	Mining Contest

ERRATUM

On January 19, 1976, this Board decided the appeal in the matter in caption. United States v: Melton E. Baker, 23 IBLA 319. In that decision a typographical error occurred in the last paragraph on page 335. Wildcat Hill No. 3 placer mining claim was incorrectly identified as being declared null and void and Wildcat Hill No. 4 placer mining claim was inadvertently not mentioned. Accordingly, the last paragraph is amended to read:

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as the Wildcat Hill Nos. 2 and 3 placer mining claims and reversed as to the Wildcat Hill Nos. 1 and 4 placer mining claims, which are hereby held to be null and void, and the case is remanded to the Bureau of Land Management for such further administrative procedures as may be necessary to implement this decision.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques

Administrative Judge

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